JAMES N. PENROD (State Bar No.: 43030)
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Tower
San Francisco, CA 94105
Telephone: 415.442.1000
Facsimile: 415.442.1001
email: jpenrod@morganlewis.com

Attorneys for SUN MICROSYSTEMS, INC., MORGAN, LEWIS & BOCKIUS LLP, AND MAKING A SPECIAL APPEARANCE FOR JEFFREY KINGSTON, WHO HAS NOT BEEN SERVED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re Application of Microsoft Corp.

Case No. 06-80038 JF (PVT)

RESPONSE OF SUN MICROSYSTEMS INC., MORGAN, LEWIS & BOCKIUS AND, BY SPECIAL APPEARANCE, JEFFREY KINGSTON, TO MICROSOFT CORPORATION'S OBJECTIONS TO MAGISTRATE'S ORDER

Date: To Be Set
Time: To Be Set
Before: Honorable Jeremy Fogel
Place: To Be Set

Complaint Filed: N/A
Trial Date: N/A

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I. INTRODUCTION

Microsoft Corporation ("Microsoft") is asking this Court—on a hurry up basis—to educate itself about the complexities of the European Union's competition law enforcement system, procedures and rules—which are different from ours in the United States—and to inject itself into the middle of a large, complex antitrust proceeding that has been going on for years. Microsoft is also asking this Court to either preempt a ruling that Microsoft has already sought before the Commission of the European Communities ("Commission" or "European Commission") or to reverse the decision of the European Commission, in effect, replacing the European Courts of Appeal ("The Court of First Instance" and the "European Court of Justice") with this trial Court in the United States.

In the process of pushing this Court, and other Courts, to a quick decision, Microsoft has also misstated the law and misled this Court, as well as the other Courts, as to the powers of the European Commission. Microsoft has now openly admitted and apologized to the Court in Boston, Massachusetts for what it calls its "good faith mistake," which led to the wrong and absolutely incorrect and misleading argument before the Court in Boston (as well as this Court) that the European Commission did not have the power to order the discovery Microsoft is requesting here. As a result of this, and the fact the European Commission has formally opposed the subpoena of Novell, Inc. ("Novell") in Boston, the Federal Judge in Boston has just granted the motion to quash filed by Novell today—April 17, 2006.

Up until Microsoft admitted this "mistake," of course, the argument it was "mistaken" about—that the Commission did not have the power to obtain the documents it seeks here—was the lynchpin of its 28 U.S.C. Section 1782 ("Section 1782") Application. Microsoft has now abandoned that argument—as it had to—because it was unquestionably wrong and misleading. Microsoft had not choice but to retool its position, yet again, by relying on one remaining claim—that it has no way of obtaining the documents it seeks here. This last remaining argument is equally and demonstrably wrong. The truth is, Microsoft has never availed itself of the established Commission procedures for obtaining these documents—procedures that have been in place for many years.

This Section 1782 Application is part of Microsoft's very public attack on the European Commission and its procedures. This Court should not allow itself to be used as a foil in Microsoft's campaign to avoid its obligations to correct serious antitrust violations under European Community competition laws.[1]

II. ARGUMENT

A. BECAUSE THE EUROPEAN COMMISSION HAS JURISDICTION OVER SUN AND CAN ORDER PRODUCTION OF THE DOCUMENTS MICROSOFT SEEKS HERE, THE *INTEL* DECISION INDICATES THAT THIS COURT SHOULD NOT ALLOW THE USE OF SECTION 1782 IN THIS CASE

1. MICROSOFT'S CURRENT POSITION AS OF APRIL 3, 2006

Microsoft's position under 28 U.S.C. Section 1782 ("Section 1782") has transformed—chameleon-like—over the past few weeks, from a shotgun blunderbuss, into Microsoft's present claim that it seeks only documents that are not in the European Commission's file. Microsoft claims that the "Commission's procedures offer no way for Microsoft or the Commission to compel" their production by way of document requests because the Commission lacks jurisdiction over Sun and because the documents are unavailable in Europe. *See* Microsoft's Objections to Magistrate's Order ("MS Objections"), Page 12, line 14, Page 13, line 8, and Page 9, line 27. Every one of these arguments is incorrect.

2. THE COMMISSION DOES HAVE THE POWER TO ORDER THE PRODUCTION OF THESE DOCUMENTS

In clear opposition to these unsupported and repetitive claims by Microsoft, the European commission **does have the power to order production of the documents sought here**. The Commission states that it has this power unequivocally in its Amicus Brief filed in the district Court in Boston. (*See* Memorandum of the Commission of the European Communities in Support

[1] In the interest of saving time space and too much duplication, Sun Microsystems, Inc. ("Sun") wishes to adopt and incorporate by reference its Memorandum of Points and Authorities in Support of its Motion to Quash the Microsoft Subpoenas filed with Magistrate Trumbull and supporting declarations ("Sun Motion to Quash.") and the Memorandum of Points and Authorities of Oracle Corporation ("Oracle")and supporting declarations in Support of its Motion to Quash Microsoft's Subpoenas to the Oracle parties. ("Oracle Motion to Quash") Those pleadings explain the structure and procedures of the European Commission as well as the history of the Microsoft case and the current subpoenas. They also discuss the leading Supreme Court decision on Section 1782, *Intel Corporation v. Advance Micro Devices*, 542 U.S. 155 (2004) ("Intel").

of Novell, Inc.'s Motion to Quash, Exhibit A to Supplemental Declaration of James N. Penrod ("Penrod Supp. Decl."), ¶ 10 ("EC Amicus Brief"); *See* Articles 15, 18, 19 and 20 of Council regulation (EC) No 1/2003, Attached to EC Amicus Brief as their Exhibit B ("Regulation 1/2003"). The Commission points out that it has very broad powers and that it exercises them "very frequently" and imposes heavy fines for non-compliance. *Id*.

In clear opposition to the unsupported statements of Microsoft, to the contrary, the European Commission **does have the authority to issue document requests and does so frequently**. Moreover, **"it has all the necessary powers to obtain the documents and information"** and it **"has, in fact, exercised them in this case."** EC Amicus brief at 17; *See* Declaration of Jeffrey Kingston is Support of this Response to Microsoft's Objections ("Kingston Supp. Decl."). The Commission also states that it has used these powers against the interested third parties, such as Sun, in the pending proceeding in Europe against Microsoft. *See* EC Amicus Brief at 11. Indeed, it would be a strange legal system that allowed the "dawn raids" Microsoft discusses, but did not allow simple document requests or subpoenas.

3. MICROSOFT'S EVEN NEWER POSITION AS OF APRIL 12, 2006

Microsoft has belatedly admitted that the Commission can issue document requests after its mischaracterizations before the Federal Judge in Boston were exposed by Novell. *See* Response of Novell to (1) Microsoft's Response to Memorandum of the Commission of the European Communities and (2) Microsoft's Supplemental Statement, Penrod Supp. Decl., Exhibit D ("Novell Response to MS") and Microsoft's Reply to Response of Novell Inc., Penrod Supp. Decl., Exhibit F ("MS Reply to Novell").

Novell pointedly told the Boston Court that Microsoft had blatantly misstated the powers of the Commission to issue document requests and that such power had been established law for many years. *See* EC Amicus Brief at 10 and Novell Response to MS at 1–2. Novell pointed out that the European Court of Justice ruled as early as 1989 that the power to request information is independent from the procedure for inspections of company premises, and that it includes the power to require the disclosure of documents. S*ee* Article 14 of Regulation 17 (now Article 20 of Regulation 1/2003); Case 374/87, *Orkem v. Commission*, (1989) ECR 3283 , ¶¶ 14, 34, attached

to Novell Response to MS as their Exhibit A.

Novell also noted that Microsoft's mischaracterization of applicable precedent was also surprising in light of the fact that the authority Microsoft cites for the proposition that the information the Commission can gather under Article 18 takes the form of written requests and written responses, analogous to interrogatories in American proceedings, rather than the document requests that Microsoft has posed here, **in fact makes no such comparison**. On the contrary, **it explicitly discusses the Commission's power to require the production of documents**. *See* V. Korah, An Introductory Guide to EC Competition Law and Practice 221–24 (2004), excerpt attached as Exhibit E to Novell Response to MS (*See* Penrod Supp. Decl., Exhibit D).

Microsoft plead guilty to this accusation of misstating the powers of the Commission in its Reply and said **"[t]he response filed by Novell on April 11 points out that the European Commission does have the authority to request documents from third parties such as Novell under Article 18 of regulation 1/2003. Novell is correct. We apologize for any inconvenience this good faith mistake concerning EC procedural law may have caused the Court."** It is difficult to understand how a "mistake" of this magnitude could occur considering the fact Microsoft has experienced counsel in Brussels. The use of the word "inconvenience" could also qualify as the understatement of the year. This "inconvenience," of course, was the major foundation of Microsoft's position both here and in Boston and it was the major foundation of the Judge's tentative conclusions in Boston—namely that he was doing something the Commission could not accomplish.[2]

Presumably, this admission of serious error in its characterization of European Commission law will lead Microsoft to withdraw its equally erroneous and incorrect statements in

[2] Microsoft seems to be asking this Court to consider the Transcript of a tentative opinion by the Boston Judge as a decision with some sort of binding precedence in this Court and, at the same time, accuses the Magistrate of "refusing to consider it." Microsoft Objections p.12 lines 1-4. First, it is not a decision; second, it would not be binding on this Court even if it was; and third, filing it after the hearing without leave of court was a blatant violation of the local rules. For all these reasons, the Magistrate acted well within her discretion not to allow it to be filed. This of course was before Microsoft admitted it had gotten the Judge in Boston to reach his tentative conclusions as a result of clear and incorrect misrepresentations about the Commission's powers in Europe.

its Objections filed with this Court. Microsoft claims that the Hearing Officer, in a letter to Microsoft on February 8, 2006, *see* Exhibit G to Declaration of Thomas W. Burt in Support of *Ex Parte* Application for Order of Discovery Pursuant to 28 U.S.C. Section 1782 ("Burt Declaration"), "effectively" took the position that she had no power to compel the production of documents that were not in the Commission's file. *See* MS Objections at 6, lines 1–8. Microsoft has relied heavily on the statement of the Massachusetts District Court to the effect that the "Hearing Officer and the commission have no power to order Novell (or Sun or Oracle) to disclose relevant documents…" *See* Microsoft Objections at 13, lines 5-8. First, the Hearing Officer makes no such statement in the letter, which is why Microsoft uses the conclusory word "effectively." Second, the statement is completely wrong and incorrect as the Commission has told us in its Amicus Brief and as Microsoft has admitted in its Reply to the response of Novell. The same is true of its heavy reliance on the comments of the District Judge in Boston, which were induced by, and based on, the completely incorrect and misleading statements made by Microsoft about the powers of the Commission.

Having admitted to a major misrepresentation to the Court, Microsoft then ignores this gaping hole in its arguments and blithely goes forward by again transforming their claim. As it had no choice, Microsoft simply drops the argument that the Commission cannot request and order production of these documents and reduces the matter to what it now calls "the central issue," which it says is that "Microsoft has no ability under Commission procedures to obtain documents Novell[3] has in its possession." See MS Reply to Novell, Penrod Supp. Decl., Exhibit F at. 1).[4] This statement is as equally incorrect as all the others.

[3] And as applied here, Sun and Oracle.

[4] The Commission has now filed a Reply Memorandum of the European Communities in Support of Novel, Inc.'s Motion to Quash Attached to the Supplemental Declaration of James N. Penrod as Ex. 6 ("EC Reply Amicus Brief") and describes Microsoft's argument's newest metamorphosis this way: "Until its most recent filing, the foundation of Microsoft's petition under 28 U.S.C. 1782 was Microsoft's mistaken premise that the commission is powerless to obtain the third party documents that Microsoft seeks through its subpoena. Microsoft now concedes that it was mistaken. As a result, Microsoft now shifts its argument and asserts that, despite the Commission's clear authority to request the documents Microsoft seeks, Microsoft nonetheless requires the intervention of the United States Courts because Microsoft *itself* does not have the ability unilaterally too obtain documents from Novell, or to compel the Commission to do so." EC Reply Brief p.1-2.

4. THE COMMISSION DOES HAVE JURISDICTION OVER SUN

In clear opposition to Microsoft's unsupported statements to the contrary (MS Objections at 19, lines 13–17), the Commission **does have jurisdiction over Sun**. The Commission says this unequivocally in its Amicus Brief in the Novell proceeding in Boston. There, the Commission stated that Novell does not need to be a party to be subject to its jurisdiction, *See* EC Amicus Brief at 11. (This appears to be similar to an American company being subject to DOJ information gathering powers). Sun does business in the European Community. Sun was the original complainant and it is an "interested third party, "like Novell, subject to the Commission's jurisdiction. Sun has also acknowledged that it is subject to the Commission's jurisdiction. *See* Declaration of Jeffrey S. Kingston in Support of Sun Motion to Quash ("Kingston Declaration"), ¶ 4. The Commission states unequivocally that **"the Commission has all the power to request any information from Novell or any other third company at any time that is relevant to the proceedings in the Microsoft case."** *See* EC Amicus Brief at 11.

Because the Commission has jurisdiction over Sun, it can request the documents Microsoft seeks here from Sun and order their production. Thus, the tentative conclusions Microsoft was able to convince the Court in Boston to reach, "the Hearing Officer and the Commission have no power to order Novell (or Sun or Oracle) to disclose" and "the Commission has no procedures for obtaining documents that are exclusively in the control of Novell" were clearly in error. *See* MS Objections to Magistrate's Order at 13, citing the Massachusetts court's transcript. That error was invited by Microsoft's misstatements about the powers of the Commission—misstatements Microsoft now abandons with little comment.

5. THE DOCUMENTS MICROSOFT SEEKS ARE AVAILABLE IN EUROPE

In clear opposition to the unsupported statements of Microsoft, the documents it seeks are either in the Brussels office of Morgan, Lewis & Bockius LLP ("Morgan Lewis") or subject to control for production from that office and, therefore, are available to be produced in Europe. *See* Kingston Supp. Decl. ¶ 4.

6. THE EUROPEAN COMMISSION'S PROCEDURES PROVIDE A MEANS FOR MICROSOFT TO OBTAIN THESE DOCUMENTS IN THAT PROCEEDING, ASSUMING THE COMMISSION IS ASKED FOR THEM, AND AGREES, AND ORDERS THE DISCOVERY

Microsoft is well versed in the European Commission's procedures for obtaining discovery of documents it deems necessary for its defense. The Commission's procedures are less formal, but not very different than the procedures in the United States. **Microsoft only has to ask for them** (by way of letter to the Hearing Officer). If the Hearing Officer and the Commission agree, they can order production of the documents and give them to Microsoft. If they disagree, the Commission denies the request and Microsoft has a right to appeal such decisions—just like in the United States. The point Microsoft seems not to understand is that the appeal is in Europe—it is not an appeal to the District Court in the Northern District of California. The Commission makes this point in its Amicus Brief when it tells the Boston court that **"[i]t is for the Community judiciary to finally establish whether a document which was not disclosed might have influenced the course of the proceedings and the content of the commission's decision. Therefore, a discovery order by a United States federal court granting access to documents which the commission has not granted access would risk interfering seriously with the above mentioned review by the European courts concerning the rights of defense and, thus, is likely to circumvent well-established domestic rules on judicial review in the European community."** *See* EC Amicus brief at 16–17. This is no different than what this Court would expect if it upheld a discovery ruling of a Federal Magistrate. This Court would expect that discovery ruling to be appealed to the Ninth Circuit—not to a trial court in France, Germany, or the European Commission in Brussels.

Without going through the history in detail, if this Court reviews the voluminous documents now in this file, it will see that on several occasions Microsoft has asked the Hearing Officer for documents that it did not have, and Microsoft has been given many documents after asking for them. Sun and the other interested third parties have even waived privileges in some instances to allow this to happen. *See* Letters between Microsoft and the Hearing Officer attached to the Burt Declaration supporting the *Ex Parte* Application, Exhibits C, D, E, F, G, and

N and the Supplemental Declaration of Joshua D. Wolson in support of MS Objections, Exhibits B and C.

Microsoft tells this Court that it has made "repeated efforts to obtain through the Commission's procedures" the documents it seeks here. *See* Microsoft Objections at 5, lines 17–19. Nowhere does Microsoft refer this Court to such a request. We don't claim to be perfect, but our review of all the letters and other correspondence between Microsoft and the Hearing Officer and the Commission has not revealed a specific request for the communications between Sun (and the other interested third parties) and the Trustee and OTR that are not in the Commission's file or that are solely in Sun's or its counsel's possession. Such a request may be in the high stack of paper this matter has generated, so it is possible we have missed it.

If we did miss it, so did the Commission. In its Reply Amicus Brief, the Commission states that Microsoft's evolving position on documents not in the Commission's file are based on misunderstandings of the law of the European Community. *See* EC Reply Amicus Brief at 2. The Commission points out that now that Microsoft is apparently satisfied that it has all the documents it seeks in the Commission's file, it is now focused on documents not in the Commission's file, but "**unlike the documents in the Commission's file, Microsoft did not first seek these documents through established Commission procedure but, instead, argued to this Court that the commission lacked power to obtain documents from third parties."** *Id*. at 2. The Commission goes on to say that "[h]ad Microsoft followed this procedure (instead of opting to seek the assistance of this court), the Commission would have been able to exercise appropriately its discretion, balancing the needs of the requesting party and the interests of the third party in a manner consistent with the laws and public policy of the European Community…" *Id*. at 3. The Commission points out that Microsoft simply ignores the fact the European procedure grants a right of appeal to two higher courts if the Commission rules against it. The Commission's view is that "[i]t is the province of the European courts, not the United States courts, to balance Microsoft's rights as a defendant against the limitations on proof gathering that are a matter of legal and public policy of the European Community." *Id*. at 3.

Although Microsoft must fail here for the simple reason that it never even tried to obtain

these documents through the established Commission procedures, even if Microsoft had actually asked for these documents from the Commission, it doesn't matter for purposes of this Court's decision here. Microsoft's Objections seem to be making up the fact they made such a request, but even if they had, this Court could only be left with two possibilities: (1) that this phantom request is still pending before the Commission or (2) that the Commission has ruled against Microsoft on the request. In either case, it would be serious error for a United States District Court to jump into the middle of the European proceeding and either order discovery that Microsoft has never asked for in Europe, or preempt or reverse a decision of the Commission concerning an identical discovery request in Europe in the face of clear opposition by the Commission. The Federal Court in Boston has reached this conclusion and issued a Memorandum and Order today, April 17, 2006, granting Novell's motion to quash an almost identical subpoena to the subpoena in issue before this Court. *See* Memorandum and Order of the United States District Court, District of Massachusetts, April 17, 2006, attached as Exhibit G to Penrod Supp. Decl.

7. THE *INTEL* DECISION HOLDS THAT SECTION 1782 SHOULD NOT BE USED IN THESE CIRCUMSTANCES

The third prong of the factors to consider set forth in the *Intel* case provide that, if the party from whom discovery was sought was subject to the jurisdiction of the foreign tribunal, it would not be appropriate to allow the use of Section 1782 in the Unites States. The reasons are fairly obvious. First, it is unnecessary and, second, it is best left to the decision of the tribunal that is in charge of the proceeding in the foreign country. Indeed, the Commission has told the Court in Boston that **"permitting Microsoft to enforce the subpoena in the face of the Commission's stated opposition would undermine the very purpose of 28 U.S.C. Section 1782 by interfering with, rather than assisting, a foreign proceeding."** EC Reply Amicus Brief at 5. The above facts—that the Commission does have jurisdiction over Sun, there are procedures that Microsoft could exercise to request the documents before the Commission, the Commission can order the production of the documents, and the documents can be produced in Europe—should be dispositive of this matter without further analysis and the Magistrate's Order

should be affirmed.

B. THE EUROPEAN COMMISSION IS UNEQUIVOCALLY OPPOSED TO THIS PROCEEDING AND THE *INTEL* DECISION AGAIN INDICATES THIS COURT SHOULD NOT ALLOW THIS DISCOVERY UNDER SECTION 1782

Microsoft is asking this Court to blindly ignore the clear and unambiguous opposition of the European Commission to this proceeding in the United States. The letter filed before Magistrate Trumbull, below, states that Microsoft is fully protected by the Commission's procedures and that granting this Section 1782 Application would be **"unduly intrusive and totally at odds with the European rules on access to file."** The Commission also states that it would **"seriously hamper the work of the Commission"** and "**seriously harm the Commission's investigatory process."** *See* Letter from the DG Competition , Declaration of James N. Penrod, Exhibit A , at 24–27 ("Commission Letter").

Microsoft, taking advantage of the differences between the inquisitorial system and our adversary system,[5] managed to convince the Judge in Boston that the Commission Letter was actually from the "prosecutor" and not the Commission. The Judge in Boston tentatively concluded that he had not actually heard from the Commission itself and he asked the Commission to come over and state its views—and it did. The Commission has since filed its Amicus Brief and its Reply Amicus Brief in Boston, and the Commission—not the DG Competition—has told the Judge in Boston that, among other things, the Commission is "**not receptive** " to this discovery (EC Amicus Brief at 1) and that the use of Section 1782 in these circumstances "**raises serious issues of law and policy**," (EC Amicus Brief at 4) that it will be "**affirmatively harmful to the Commission's sovereign interests**"(EC Amicus Brief at 14), that it would **"contravene principles of international comity**" (EC Amicus Brief at 1) and that **"permitting the discovery requested by Microsoft would be a serious risk of contravening principles of international comity by interfering with law enforcement and sovereign policy choices in the handling of law proceedings in the European community."** (EC Amicus Brief p. 17).

[5] Magistrate Trumbull understood and discussed these differences.

The Commission also states that granting Section 1782 requests such as Microsoft's **"would seriously compromise the Commission's powers of investigation and competition law enforcement."** (EC Amicus Brief at 14) and that this use if section 1782 risks **"subversion of the regulatory limits on an antitrust defendant's access to file"**—limits that **"are lawfully imposed by the European Community, in the exercise of its sovereign regulatory powers in its territory pursuant to the public interest."** (EC Amicus Brief at 15). In its Reply Amicus Brief, the Commission reiterates several of these points and notes that the Commission "neither requires nor wants the assistance of the United States Courts in this matter" and that "[a]s Microsoft now admits, the Commission has the authority to obtain the requested documents and exercises that authority as appropriate to maintain control of the proof-gathering practices in matters before it" and that its opposition to the use of Section 1782 here deserves "substantial deference" under *Intel* and other cases. *See* EC Reply Amicus Brief at 4–5.

Although Microsoft seems to miss the point, it is hard to imagine how the Commission could express its opposition to this proceeding any more clearly.

The fact the Commission is unalterably opposed to this use of Section 1782 should be dispositive of this matter with no further analysis under the first factor of the *Intel* decision. That factor requires this Court to consider the attitude and receptiveness of the foreign tribunal to the use of Section 1782. To override the Commission's open and clear opposition would be a shock to principles of international comity—principles to which the Supreme Court has become more sensitive[6] and which the Supreme Court discussed in the *Intel* decision.

C. MICROSOFT OPENLY ADMITS THAT IT IS SEEKING TO CIRCUMVENT THE RULINGS OF THE EUROPEAN COMMISSION -- THE COMMISSION AGREES AND STRONGLY OPPOSES THIS CIRCUMVENTION OF ITS RULINGS AND PROCEDURES

Microsoft's Associate General Counsel, when he publicly announced Microsoft's new strategy of attacking the Commission and its procedures, openly admitted that Microsoft is coming to the United States to circumvent the Commission and to a more favorable ruling. He said "[o]ur repeated requests to the European Commission for full and fair file access have not

[6] *Hoffman LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004).

been successful, so we are now turning to the U. S. Courts for assistance." *See* Yates Declaration in Support of Oracle's Motion to Quash, Exhibit 18 ("Yates Declaration").

The Commission, in the Letter to this court and in its Amicus Brief in Boston, agrees that this is what Microsoft is doing. In the Letter to this Court, the Commission said that Microsoft's attempt to use Section 1782 here is "**an attempt to circumvent established rules on access to file in proceedings before the commission**," and such a request would **"circumvent and undermine**" the European Rules on access to file. *See* Commission Letter ¶¶ 23, 24–25. In the Amicus Brief the Commission filed in the Federal Court in Boston, the Commission says that it **"believes that enforcement of Microsoft's subpoena would pose a serious risk that the commission's rules and procedures concerning competition law enforcement would be circumvented"** (EC Amicus Brief at 1) and that **"Microsoft's discovery request under 28 U.S.C. Section 1782(a) is seen rather as an attempt to circumvent established rules on access to file in proceedings before the commission**" (EC Amicus brief at 10). The Commission sees this as an attempted **"subversion of the regulatory limits on an antitrust defendant's access to file"—**limits that **"are lawfully imposed by the European Community, in the exercise of its sovereign regulatory powers in its territory and pursuant to the public interest.** *See* EC Amicus Brief at 15.

In its reply Amicus Brief, the Commission elaborates on many of these points. The Commission notes that **"[i]f Microsoft were to avail itself of the Commission's procedure and ask the Commission to obtain the documents it now seeks, the commission would consider, under the law of the European Community, whether the probative value of the requested documents is sufficient to justify the costs – both to the Commission and the producing third party – of obtaining them. This Court should not by enforcing Microsoft's subpoena usurp the authority of the Commission (and of the European courts reviewing the Commission's decision) to make that judgment."** EC Reply Amicus Brief at 6.

Again, on the basis of these facts alone, the Magistrate's Order granting Sun's Motion to Quash should be upheld under the second factor to consider from *Intel* which told the lower courts not to allow Section 1782 to be used as a veiled attempt to circumvent rulings in the

foreign tribunal. Microsoft admits, and the Commission agrees, that this is the very kind of end-run *Intel* warned against.

D. THE COMMISSION'S RULES ARE REASONABLE AND BALANCE THE RIGHTS OF ALL PARTIES AND THE COMMISSION'S INVESTIGATIVE PROCESSES, AND THIS COURT SHOULD NOT UPSET THAT BALANCE

Now that Microsoft agrees that the Commission has the power to compel production of the documents, this Court should not exercise its discretion in a way that would upset the balance that the Commission's rules strike between the party under investigation, third parties and the Commission's own investigatory processes. For example, the European Court of Justice has held that a party under investigation that holds a dominant market position might retaliate against entities that have cooperated with an investigation by the Commission. Microsoft agreed in the underlying case that it held a dominant position in the supply of operating systems that run on personal computers. *See* Recital 429 of the March 2004 Decision attached as Ex G to the Novell Response to MS; Penrod Supp. Decl., Exhibit D.

Microsoft was also found to hold a dominant position in the market for work group server operating systems. *Id*. at Recital 541. This danger is carefully considered and balanced with other rights of the parties by the Commission and is discussed in the applicable notice on access to file (E.G., ¶ 19), that Microsoft submitted as Exhibit O to the Burt Declaration as well as by European Community case law. *See* Case C-310/93 *P BPB Industries and British Gypsum v. Commission* (1995) I-865, ¶¶ 26–27, attached as Exhibit F to the Novell Response to MS (attached to the Penrod Supp. Decl., Exhibit D). If a third party communicates with the Commission in confidence, the Commission can make a decision whether to protect that confidentiality or not. In either case, this Court should not circumvent what the European Community considers an essential protection that goes to the core of its investigations and enforcement proceedings. As we argued to the magistrate, in the final analysis, nothing Microsoft has not been given can be used against it in the proceedings. *See* Case 107/82 *AEG-Telefunken AG v. Commission* (1983) ECR 3151 ¶ 27; *Solvay SA v Commission* (1995) ECR II-1775 ¶¶ 81–87, both submitted to the Magistrate as Exhibit D to Penrod Decl.

This is just one example of the difficulty this Court faces in enforcing a subpoena that will interfere with the sovereign policy choices made by the European Community.[7] The balance they have struck between the rights and interests of all the parties involved should be respected by this Court in accordance with principles if international comity. For these reasons, the Court should uphold the Order of Magistrate quashing the subpoena.

E. MICROSOFT'S ATTEMPTS TO DISTINGUISH THE *INTEL* DECISION ARE STRAINED AND ILLOGICAL

1. THE SUPREME COURT WAS MAKING BROAD POLICY STATEMENTS IN THE *INTEL* DECISION

With respect to the *Intel* decision, Microsoft wants to convert the Supreme Court from a general policy making court to one that always narrowly limits its decisions to the precise facts before it. *See* MS Objections at 18–19. That is not what the Supreme Court usually does. It usually sets policy. The *Intel* decision is a broad policy statement about Section 1782. Moreover, nothing in the *Intel* decision suggests that the Court was limiting the decision to its precise facts. Indeed, the Court went out of its way to explain it was not deciding the facts of the case. That was left to judge Ware in this District who—on facts strikingly similar to the facts here, involving the same European Commission—denied all discovery in light of the policy statements in the *Intel* decision. As discussed above, each of the primary policy considerations set forth in the *Intel* decision—the receptivity of the foreign tribunal, whether the party from whom discovery is sought is subject to the jurisdiction of the foreign tribunal, and whether the use of Section 1782 is a veiled attempt to circumvent the rulings or policies of the foreign tribunal—lead to the conclusion that the magistrate's Order should be upheld. *See Intel*, 541 U.S. at 264–65.

2. MICROSOFT'S RELIANCE ON THE *EUROPMEPA* CASE IS MISLEADING

As it did below, Microsoft relies on *In re Application of Europmepa S.A.*, 51 F. 3d 1095 (2d Cir. 1995) as setting a general standard for Section 1782 applications. As it did below, Microsoft leaves out the most important phrase in that decision.

[7] It is worth noting that Microsoft's problems are not the result of the Commissions procedures. Microsoft's problems are the result of scathing reports by the very computer expert Microsoft recommended as a monitoring trustee and which Microsoft is paying to perform that function.

Before the Magistrate, Microsoft quoted from the *Europmepa* case for the following proposition: Section 1782's "underlying policy should generally prompt district courts to provide some sort of discovery assistance." *See* Microsoft Corporation's Consolidated Memorandum of Points and Authorities in Opposition to Motions to Quash Subpoenas ("MS Consolidated Opposition"), at 14. The quoted language did not contain the customary three dots at the beginning which would alert the Magistrate to the fact that they had left part of the quote out. The actual quote at 51 F 3d 1105, however, reads as follows: **"Absent specific directions to the contrary from a foreign forum**, the statutes underlying policy should generally prompt district courts to provide some sort of discovery." (Emphasis added). For purposes of this Court's consideration of the *Europmepa* case on this record, dropping the first half of that quote completely changes the meaning and impact of the decision.

This misleading maneuver was pointed out during oral argument before the Magistrate during argument, so now Microsoft uses another quote from *Europmepa* which says the following: Where possible, it is "far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *See* Microsoft Objections at 18, lines 22–25. On the very same page of the decision, the Second Circuit pointedly said that the record contained "no authoritative declarations by French judicial, executive or legislative bodies objecting to foreign discovery assistance…". *See Europmepa* 51 F.3d at 1101. It is submitted again that the use of this decision without telling this Court about the foundational condition the *Europmepa* court made—**"Absent specific directions to the contrary from the foreign forum"**—is misleading and suggests the case stands for something that it does not in the context of this case.

We mention this only to illustrate how strained Microsoft's attempts to avoid the impact of the *Intel* decision are.

3. MICROSOFT'S ANALYSIS OF THE LEGISLATIVE HISTORY OF SECTION 1782 IS ILLOGICAL

Microsoft argued below that the legislative history of the 1964 amendments to Section

1782 reads as follows: "in exercising its discretionary power, the court may take into account the nature and attitudes *of the government of the country from which the request emanates* and the character of the proceedings in that country." S. Rept 88-1950 at 7. MS Consolidated Opposition at 16, lines 3–12 (emphasis added by Microsoft).

Microsoft argued that this meant that the court was supposed to consider the attitude of the foreign government only if that government was making the request. First, very rudimentary powers of reasoning would suggest that, if the foreign government was making the request, that government must think it is a good idea. Its attitude or receptivity would be obvious, and Microsoft's interpretation would render the legislative history meaningless at best and ridiculous at worst. Secondly, the Supreme Court in *Intel* considered the same legislative history and said nothing to indicate that it was reading the history in a way that limited its decision to an issue of who was requesting the discovery.

It seems wholly unnecessary to revisit the same legislative history the Supreme Court considered already when there is a well-reasoned decision of the Supreme Court that is on point. If we must revisit it, however, the only reasonable way to read the legislative history is the way the Supreme Court obviously read it—that this Court should consider the attitude and receptivity of the country or tribunal where the proceeding that has led to the Section 1782 request is pending.

4. MICROSOFT CREATES STRAW MEN TO DEFLECT THE COURT FROM THE OBVIOUS CONTROLLING EFFECT OF THE INTEL DECISION IN THIS CASE

Microsoft spent a lot of time below taking us to task for arguing that Section 1782 can be used only to assist foreign tribunals and that Microsoft falls within the *Intel* decision's definition of "interested party." See MS Consolidated Opposition at 1–2. We have never said that Microsoft does not have standing to be here. This is a straw man Microsoft sets up and knocks down to deflect the Court from the main factors the *Intel* Court provided for consideration here. What we are saying is that Section 1782 is designed to help to obtain discovery that is otherwise not available in a foreign jurisdiction, where the foreign jurisdiction is not opposed to discovery, and where it is not an attempt to circumvent the foreign jurisdiction.

5. THE *INTEL* DECISION IS CONTROLLING AND MANDATES THAT THIS COURT SHOULD UPHOLD THE ORDER OF THE MAGISTRATE

Microsoft's makes these strained attempts to escape the *Inte*l decision because it is obvious that Microsoft loses if the *Inte*l decision is applied to these facts. For all of the reasons stated above, the three controlling factors in the *Intel* decision should lead this Court to uphold the decision of the Magistrate. This Court should never reach the fourth factor—the burdensomeness and intrusiveness of the subpoenas.

III. CONCLUSION

It seems clear what Microsoft is doing here. It does not like the decisions of the European Commission and it is coming here—and to two other Federal courts—to circumvent the Commission and in an attempt to get a decision they like.

Microsoft has chosen to do business in the European Community voluntarily subjecting itself to the European Community's courts, laws and procedures. European companies like BMW and Alcatel choose to do business in the United States subjecting themselves to our courts, laws and procedures. These companies do not get to run back to France or Germany or Brussels to ask their courts to change our rules and procedures.

Microsoft is asking this Court to ignore the European Commission's strong opposition to this procedure as well as the *Intel* decision and to interject itself into the middle of a large, complex and long proceeding and either preempt or reverse decisions of the European Commission. Such a result would be in direct contravention of the Supreme Court's strong direction to consider principles of international comity in making these decisions.

It has been said that "comity" is a certain degree of trust between countries in each other's systems even though they may operate differently. It has also been said that comity is a concept that is, and will, become more important as antitrust enforcement spreads around a shrinking world. The alternative—an international system of seriatim review by different authorities that enables opponents of a particular decision to skip around the globe until they get an answer they like—must be seen as unacceptable. This is exactly what Microsoft is doing.

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For all of the foregoing reasons, this Court should affirm the Magistrate's well-reasoned Order.

Dated: April 17, 2006

MORGAN, LEWIS & BOCKIUS LLP

By /s/
James N. Penrod
Attorneys for SUN MICROSYSTEMS, INC., MORGAN, LEWIS & BOCKIUS AND MAKING A SPECIAL APPEARANCE FOR JEFFREY KINGSTON